RECOGNITION OF RIGHTS AND OBLIGATIONS IN SAME SEX RELATIONSHIPS

Research Paper No. 21

January 2002

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

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Printed in Canada

ISSN 0838-0503
ISBN 1-896078-09-5

102-03712/

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ACKNOWLEDGMENTS

The question of recognition of relationships outside marriage has been under consideration for some time. In 1998 we published Report No. 53 with proposals for reform of the law relating to cohabitation outside marriage. More recently the Supreme Court of Canada has added further dimensions to this area in decisions dealing with *Charter* challenges to the treatment of cohabitees under a number of statutes.

The Board decided therefore to publish its ongoing research so as to add to the debate on this topic and to assist in informing the policy decisions to be made.

For some time, Janice Henderson-Lypkie, one of our counsel kept this watching brief, parts of which were discussed in our reports on intestate succession and matrimonial property (Report for Discussion No. 16 and Final Report No. 83).

After Ms. Henderson's return to practice, the brief was taken on by Cynthia Martens, to whom has fallen the responsibility for updating and continuing the research, and for preparing this Research Paper. We acknowledge, with gratitude, the speed with which the research has been prepared for publication, and the fact that a number of very recent developments have been summarized and brought into the review.

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CHAPTER 1. INTRODUCTION

[1] Over the past several years the traditional form of close personal adult relationships has undergone significant changes. At one time marriage was the key indicator of an intimate and interdependent relationship between two adults. However, while marriage continues to be one indication of a close personal relationship between adults, many adults are in "marriage-like" relationships who, for a variety of reasons, have not formally married. The law recognizes the value of close personal relationships, and in many cases directly supports them. The government uses these relationships as one way of organizing social policies and delivering social programs through legislation.[1] However, in many areas the law has not kept pace with the changes in the forms of close adult personal relationships as many laws do not recognize "marriage-like" relationships.

[2] In some instances where the law does not give legal recognition to the changing nature of personal relationships, people in "marriage-like" relationships have challenged many statutes, both provincially and federally, under section 15(1) (the equality guarantee) of the *Canadian Charter of Rights and Freedoms*. In these challenges individuals claimed that certain legislative provisions discriminated against them by failing to recognize their personal relationships. Challenges have been brought by both opposite sex and same sex individuals who cohabit in marriage-like relationships. As a result of these challenges, same sex couples are now included in many legislative provisions which provide rights or obligations to married people or opposite sex common law couples. Despite these changes which have been initiated through legal action, the provincial legislatures and Parliament have been slow to make widespread reforms to laws to recognize relationships comprised of individuals of the same sex.

[3] Thus, the changing nature of personal relationships gives rise to two issues of legislative conformity with the *Charter*:

(1) Does the legislation in issue discriminate on the basis of marital status; and

(2) If so, what constitutes a "marriage-like" relationship?

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[1] Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults* (Discussion Paper) (Ottawa: Law Commission of Canada, 2000).

[4] In 1995 the Supreme Court of Canada held that certain legislated rights which are given to married couples must also be afforded to heterosexual common law couples.[2] In 1999 the Supreme Court of Canada found that legislation which denied individuals in same sex relationships access to court-enforced spousal support benefits which were availed to opposite sex common law couples violated the equality guarantee in section 15(1) of the *Charter*.[3] The Court further held that the legislation was not saved under section 1 of the *Charter*. The Court ordered that the legislation be amended to include same sex couples. The Supreme Court decision does not give special benefits or treatment to people in same sex relationships; rather, it merely recognized that same sex couples are entitled to the same rights as heterosexual common law couples.

[5] The Supreme Court of Canada decision in *M.* v. *H.* clearly impacts other statutes that distribute benefits, rights, and responsibilities on the basis of a definition of "spouse" and which exclude same-sex couples from such benefits, rights and responsibilities.[4] It is now difficult for a government to justify discriminatory legislation that denies same sex partners rights to which opposite sex, common law couples are entitled.[5] It is therefore incumbent upon the federal and provincial governments to respond to the Supreme Court directive by taking legislative action to ensure that individuals in same sex relationships are afforded equal treatment under the law with others who are in marriage-like relationships.

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[2] *Miron* v. *Trudel*, (1995), 124 D.L.R (4th) 693 (S.C.C.).

[3] *M.* v. *H.* (1999), 171 D.L.R. (4th) 577 (S.C.C.) [hereinafter *M.* v. *H.*]. This decision concerned the ability of a person in a same sex relationship to claim spousal support under the Ontario *Family Law Act*, R.S.O. 1990, c. F-3, s. 29 [hereinafter *FLA*]. The *FLA* defined "spouse" for the purpose of spousal support as "includ[ing]...either of a man and woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child." This decision is discussed in detail in Chapter 2 below.

[4] *Ibid.* at 645.

[5] N. Bala, "Alternatives for Extending Spousal Status in Canada" (2000) 17 Can. J. Fam. L. 169 at 175.

[6] While the federal government and several other provinces have made various reforms in response to the Supreme Court decision in *M.* v. *H.*, Alberta has not addressed the issue through any comprehensive legislative action.[6]

[6] In January of 2002 Alberta Justice released a Public Workbook and Technical Workbook entitled *Alberta Family Law Reform*. These are consultation documents which address issues about, *inter alia*, same sex relationships. At the time of publication consultations on these documents are ongoing.

CHAPTER 2. SECTION 15(1) *CHARTER* RIGHTS AND SEXUAL ORIENTATION

A. Section 15(1) Generally

[7] The purpose of the *Charter* is to protect individuals from legislation or other government action which infringes certain rights that are fundamental to a free and democratic society. Section 15(1) of the *Charter* provides an equality guarantee:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[8] Sexual orientation has been held to be an analogous ground under section 15.[7] As such, legislation cannot discriminate against individuals on the basis of sexual orientation.

[9] Section 15 is to be interpreted and applied in a purposive and contextual manner to permit realization of the provision's strong remedial purpose.[8] The purpose of section 15 is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[10] There is a two step process for determining the constitutionality of a legislative provision under section 15 of the *Charter*. First it must be determined whether the impugned provision does indeed violate section 15. If so, the onus then falls on the legislator to prove that the discriminatory effect of the legislation is justified under section 1 of the *Charter*, in that it is a "reasonable limit in a free and democratic society".

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[7] *Egan* v. *Canada* (1995), 124 D.L.R. (4th) 609 (S.C.C.); *M.* v. *H.*, *supra* note 3; *Johnson* v. *Sand*, 2001 ABQB 253; *Vriend* v. *Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.).

[8] *Law* v. *Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.); *M.* v. *H.*, *supra* note 3.

[11] The existence of a conflict between the purpose or effect of an impugned law and the fundamental purpose of the equality guarantee is essential to found a claim of discrimination under section 15(1). To determine whether this conflict exists, the court makes three inquiries:

(1) Does the impugned law

(a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or

(b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment between the claimant and others on the basis of one or more personal characteristics?

If so, there is differential treatment for the purpose of section 15(1).

(2) Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?

(3) Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?

[12] If it is found that a legislative provision violates the *Charter*, the court then determines whether the provision is saved by section 1 of the *Charter*. Under section 1, legislation which is *prima facie* discriminatory may be justified if the legislator can demonstrate that the infringement of the claimant's right is a reasonable limit in a free and democratic society. There is well-established test[9] which determines whether a legislative provision is saved under section 1:

(1) Does the legislation have a pressing and substantial objective?

(2) Proportionality test:

(a) Is there a rational connection between the objective of the provisions under attack and the means chosen by the government to implement the objective?

(b) Does the legislation minimally impair the claimant's rights?

(c) Is there proportionality between the effect of the measure which infringes the claimant's rights and the objective of the legislation?

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[9] *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.); *M.* v. *H.*, *supra* note 3.

B. Section 15 and Discrimination on the Ground of Sexual Orientation

[13] As the test to determine whether a particular legislative provision is discriminatory may seem rather esoteric, an examination of how it was applied in *M.* v. *H.* helps to illustrate the process and highlights relevant considerations for examining the equality guarantee and rights of individuals in same sex relationships.

1. Analysis under section 15(1) of the *Charter*

[14] The section 15(1) challenge in *M.* v. *H.* was to the definition of "spouse" for the purpose of court-enforced spousal support Ontario *Family Law Act*. "Spouse" was defined in the Act as:

> "includ[ing]...either of a man and woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."

Although the legislation included both married couples and opposite sex common law couples, the definition of "spouse" clearly excluded same sex couples from the benefits afforded by the legislation, which was access to a court-enforced system of spousal support.

[15] Using the section 15(1) analysis set out above,[10] the Supreme Court held that the *FLA* clearly drew a distinction between unmarried opposite sex couples who cohabited, and unmarried same sex couples who cohabited.[11] The distinction was on the basis of a personal characteristic, sexual orientation, as same sex couples are capable of both being in conjugal relationships and meeting temporal requirements of legislation which defined common law couples. The only criteria for claiming spousal support which same sex couples did not meet was being "either of a man and woman".

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[10] While the Ontario Attorney General conceded that the provision in the *FLA*, *supra* note 3 contravened s. 15(1) of the *Charter*, the Supreme Court of Canada carried through with the s. 15 analysis , remarking that the s. 15(1) issue was "important...to many Canadians" (*M.* v. *H.*, *supra*, note 3 at 611).

[11] The Court held that rights and obligations of married people were not relevant, because the *FLA*, *supra* note 3 did not extend all rights thereunder to unmarried opposite sex common law couples. As such, the proper comparison group for this specific s. 15(1) challenge was unmarried opposite sex couples.

[16] The Court made several findings:

(i) the distinction between unmarried opposite sex couples and unmarried same sex couples discriminated against same sex couples in a substantive sense by violating their human dignity;

(ii) individuals in same sex relationships face significant pre-existing disadvantage and vulnerability;

(iii) the exclusion of same sex partners in that case implied that they are incapable of forming intimate relationships, an implication which the court held was completely without foundation;

(iv) the legislation failed to take into account the claimant's actual situation; and

(v) the same sex couple had been in a long term, economically interdependent relationship.

[17] The Court also held that the legislation affected a fundamental interest, being the claimant's ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and dependence.

2. Section 1 analysis

[18] Under the section 1 analysis the Court found that the purpose of the legislation was to ensure the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down.[12] Another purpose of the legislation was to alleviate the burden on the public purse by imposing financial obligations on parents and spouses who have the capacity to provide support to those individuals.

[19] The Court found no rational connection between excluding same sex couples from this legislation and the purposes of the legislation. Rather, the Court held that the purposes of the legislation were actually defeated by excluding unmarried opposite sex couples.

[20] According to the Court, the legislation also failed the minimal impairment arm of the section 1 test. There was an absolute impairment of the claimant's rights, as same sex couples were entirely denied the right to access court-enforced

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[12] *M.* v. *H.*, *supra* note 3 at 629.

spousal maintenance. No other group would be disadvantaged by granting members of same sex couples access to spousal support, thus the notion of deference to legislative choices in the sense of balancing claims of competing groups was not applicable. The damaging effects engendered by the exclusion of same sex couple were found to be numerous and severe. Finally, as the effect of the legislation actually undermined the objectives of the legislation, it could not be said that the deleterious effects of the legislation were outweighed by the salutary effects of that statutory provision.

[21] The Court held that section 29 of the Ontario *Family Law Act* contravened section 15 of the *Charter* and that the contravention was not justified under section 1. The Court declared section 29 to be of no force and effect, but temporarily suspended the remedy for six months to allow the legislature the opportunity to devise its own approach to ensuring that the legislation conformed with the *Charter*.[13]

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[13] *M.* v. *H.*, *supra* note 3 at 644-645.

CHAPTER 3. *CHARTER* ISSUES IN ALBERTA LEGISLATION REGARDING SEXUAL ORIENTATION

A. Previous Challenges to Alberta Legislation

[22] There have been a number of *Charter* challenges to Alberta legislation alleging discrimination on the ground of sexual orientation,[14] both prior to and after the *M.* v. *H.* decision. In each case the impugned legislation was found to be discriminatory and it was held that the legislation was not saved under section 1 of the *Charter*. The Alberta government was given a period of time to amend the legislation to bring the legislation in conformity with the *Charter*.[15]

B. Other Alberta Legislation which is Vulnerable to *Charter* Challenge

[23] Currently there are approximately 70 pieces of legislation which may arguably violate the rights of individuals in same sex relationships under section 15(1) of the *Charter*. These various legislative provisions currently grant benefits and rights to, or impose certain responsibilities on, either "spouses", "husbands" or "wives". In some of these statutes the term "spouse" is not specifically defined; in others it is. Where it is defined the definition clearly excludes same sex couples, although it often includes opposite sex common law couples. The majority of the affected provincial statutes can be grouped into general categories:

> 1) Legislation which governs economic aspects of the relationship between the parties which arise upon death or the breakdown of the relationship;[16]

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[14] *Johnson* v. *Sand*, *supra* note 7 (*Intestate Succession Act*, R.S.A. 1980, c. I-9); *Re A (Adoption)* (1999), 181 D.L.R. (4th) 300 (Alta. Q.B.) (private adoption provisions in the *Child Welfare Act*, S.A. 1984, c. C-8.1); *Vriend* v. *Alberta*, *supra* note 7 (inclusion of sexual orientation as a protected ground in the *Individual Rights Protection Act*, R.S.A. 1980, c. I-2 (now the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-11.7)).

[15] In *Re A (Adoption)*, *supra*, note 14 on the eve of trial the provincial government voluntarily amended the provisions of the *Child Welfare Act*, *ibid.*, which were being challenged to include same sex couples in the "private adoption" provisions.

[16] *Administration of Estates Act*, R.S.A. 2000, c. A-1, s. 7; *Co-operative Association Act*, R.S.A. 2000, c. C-24, s. 20; *Domestic Relations Act*, R.S.A. 2000, c. D-37; *Family Relief Act*, R.S.A. 2000, c. F-2; *Fatal Accidents Act*, R.S.A. 2000, c. F-5; *Income Support Recovery Act*, R.S.A. 2000, c. I-1.7; *Insurance Act*, R.S.A. 2000, c. I-5.1, ss. 580, 616; *Intestate Succession Act*, R.S.A. 2000, c. I-9; *Maintenance Enforcement Act*, R.S.A. 2000, c. M-0.5; *Matrimonial Property Act*, R.S.A. 2000, c. M-9; *Motor Vehicle Administration Act*, R.S.A. 2000, c. M-22; *Provincial Court Act*, R.S.A. 2000, c. P-20, s. 30; *Public Trustee Act*, R.S.A. 2000, c. P-36; *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6.

2) Legislation which delegates decision making powers when one party becomes mental or physically incapacitated;[17]

3) Taxation, pension and government benefits legislation;[18]

4) Legislation concerning children, including parental responsibility for naming of and decision making for children, adoption, ability to seek child support;[19]

5) Legislation which protects privileged marital communications made between spouses;[20] and

6) Conflict of interest legislation.[21]

[24] There are other statutes which exclude individuals in same sex relationships due to references to "spouse", "husband" or "wife" in other contexts[22] which

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[17] *Dependent Adults Act*, R.S.A. 2000, c. D-32; *Mental Health Act*, R.S.A. 2000, c. M-13.1; *Personal Directives Act*, R.S.A. 2000, c. P-4.03; *Protection for Persons in Care Act*, R.S.A. 2000, c. P-19.5; *Human Tissue Gift Act*, R.S.A. 2000, c. H-12.

[18] *Assured Income for the Severely Handicapped*, R.S.A. 2000, c. A-48; *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-24, s. 3; *Alberta Income Tax Act*, R.S.A. 2000, c. A-31; *Alberta Personal Income Tax Act*, S.A. 2000, A-35.03; *Health Insurance Premiums Act*, R.S.A. 2000, c. H-5; *Hospitals Act*, R.S.A. 2000, c. H-11; *Members of the Legislative Assembly Pension Plan Act*, R.S.A. 2000, c. M-12.5; *Employment Pension Plans Act*, R.S.A. 2000, c. E-10.05; *Social Development Act*, R.S.A. 2000, c. S-16; *Victims of Crime Act*, R.S.A. 2000, c. V-3.3; *Widows' Pension Act*, R.S.A. 2000, c. W-7.5; *Workers' Compensation Act*, R.S.A. 2000, c. W-16.

[19] *Legitimacy Act*, R.S.A. 2000, c. L-11; *Change of Name Act*, R.S.A. 2000, c. C-4; *Vital Statistics Act*, R.S.A. 2000, c. V-4; *Adult Adoption Act*, R.S.A. 2000, c. A-2.3; *Parentage and Maintenance Act*, R.S.A. 2000, c. P-0.7.

[20] *Alberta Evidence Act*, R.S.A. 2000, c. A-21, s. 8.

[21] *Business Corporations Act*, R.S.A. 2000, c. B-15, ss. 1(c), 42; *Companies Act*, R.S.A. 2000, c. C-20; *Conflicts of Interest Act*, R.S.A. 2000, c. C-22.1; *Credit Union Act*, R.S. A. 2000, c. C-31.1; *Alberta Treasury Branches Act*, R.S.A. 2000, c. A-37.9; *Insurance Act*, *supra* note 16, ss. 1(i.l), 314, 434, 440; *Irrigation Districts Act*, R.S.A. 2000, c. I-11.7; *Loan and Trust Corporations Act*, R.S.A. 2000, c. L-26.5; *Local Authorities Election Act*, R.S.A. 2000, c. L-27.5; *Metis Settlements Act*, R.S.A. 2000, c. M-14.3; *Municipal Government Act*, R.S.A. 2000, c. M-26.1; *Partnership Act*, R.S.A. 2000, c. P-2; *Powers of Attorney Act*, R.S.A. 2000, c. P-13.5; *School Act*, R.S.A. 2000, c. S-3.1; *Securities Act*, R.S.A. 2000, c. S-6.1; *Wills Act*, R.S.A. 2000, c. W-11.

[22] *Dower Act*, R.S.A. 2000, c. D-38; *Change of Name Act*, *supra*, note 19, s. 13; *Builders' Lien Act*, R.S.A. 2000, c. B-12, s. 11; *Election Act*, R.S.A. 2000, c. E-2; *Fair Trading Act*, R.S. A. 2000, c. F-1.05, s. 43; *Fatality Inquiries Act*, R.S.A. 2000, c. F-6; *International Conventions Implementation Act*, R.S.A. 2000, c. I-6.8; *Land Titles Act*, R.S.A. 2000, c. L-5, ss. 128, 159; *Law of Property Act*, R.S.A. 2000, c. L-8, ss. 5-6; *Gaming and Liquor Act*, R.S.A. 2000, c. G-0.5, s. 84 (3); *Married Women's Act*, R.S.A. 2000, c. M-7; *Public Lands Act*, R.S.A. 2000, c. P-30; *Tort-Feasors Act*, R.S.A. 2000, c. T-6, s. 3(1)(b); *Young Offenders Act*, R.S.A. 2000, c. Y-1.

cannot be conveniently grouped into categories, but nevertheless need to be brought into conformity with the equality guarantee in the *Charter*.

[25] It cannot be said that each piece of legislation which excludes same sex couples conclusively violates the *Charter*. It is necessary to evaluate each statute on its own merits and examine the unique objective and legislative context of each provision to determine whether a particular provision is in fact discriminatory. If the provision is discriminatory, it must then be determined whether that provision is saved under section 1 of the *Charter*. However, in light of the comments of the Supreme Court, it is likely that future *Charter* based challenges to most, if not all, of the Alberta legislation which excludes same sex couples from benefits afforded to common law couples (and perhaps married couples)[23] will be successful.

C. Evaluation of Existing Alberta Legislation

[26] Again, while it is necessary to evaluate each potentially discriminatory statutory provision on its own merits, certain general comments may be made about legislation which falls into the above-defined categories indicating why it may be vulnerable to *Charter* challenges.

[27] It must first be noted that there is no dispute that sexual orientation is a protected ground under the *Charter*.[24] It has been made clear by the Supreme Court of Canada as well as the Alberta Court of Queen's Bench that for the purposes of section 15(1) of the *Charter*, same sex couples and gay and lesbian individuals, have been traditionally disadvantaged and "continue to suffer serious social, political and economic disadvantage".[25] The main questions which must be addressed are whether the legislation results in discriminatory treatment in a

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[23] Although the decision in *M.* v. *H.*, *supra* note 3 dealt only with the discriminatory effects of legislation which drew a distinction between same sex and opposite sex common law couples, there is other Supreme Court of Canada authority which founds a strong argument that legislation which draws a distinction between same sex couples and married couples is also discriminatory. This will be discussed in detail below.

[24] *Egan* v. *Canada*, *supra* note 7; *Vriend* v. *Alberta*, *supra* note 7; *M.* v. *H.*, *supra* note 3; *Johnson* v. *Sand*, *supra* note 7.

[25] *M.* v. *H.*, *supra* note 3 at 617; *Egan* v. *Canada*, *supra* note 7 at 619-620 and 674-676; *Vriend* v. *Alberta*, *supra* note 7 at 424; *Johnson* v. *Sand*, *supra* note 7 at para. 32.

substantive sense, and whether it can be demonstrated that the legislation is a reasonable limit under section 1 of the *Charter*.

1. Legislation which governs economic aspects of the relationship between the parties which arise upon death or the breakdown of the relationship

[28] Legislation which governs economic aspects of a relationship upon the cessation of the relationship has been the subject of several *Charter* challenges on the ground that the legislation should recognize certain "marriage-like relationships".[26] The general purpose of this legislation is to equitably resolve economic disputes which arise upon cessation of a relationship between individuals who have been financially interdependent.[27] Similarly, the purpose of legislation dealing with distribution of property upon death is to distribute an individual estate among those involved in close, intimate, interdependent relationships with that individual.[28] There is also an ancillary objective which has been recognized for both types of legislation, being to place the responsibility for economic support on the individuals in a relationship rather than having them look to the state for support upon the termination of the relationship.[29] These objectives are of fundamental importance to people who have been in financially interdependent relationships. Denying certain groups access to the legislated processes that provide for the equitable distribution of property may be seen as fundamentally discriminatory.

[29] As recognized by the Supreme Court of Canada, same sex couples are capable of being in committed, intimate, interdependent relationships in the same manner as opposite sex couples.[30] Excluding same sex couples from legislation which seeks to provide equitable resolutions for financial matters upon the termination of those relationships is not rationally connected to the objectives; in

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[26] *M.* v. *H.*, *supra* note 3; *Johnson* v. *Sand*, *supra* note 7.

[27] *M.* v. *H.*, *supra* note 3 at 625.

[28] *Johnson* v. *Sand*, *supra* note 7 at para. 26.

[29] *M.* v. *H.*, *supra* note 3 at 629, relying on the Ontario Law Reform Commission, *Report on Family Law, Part VI: Support Obligations* (Toronto: Department of Justice, 1975); Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults*, *supra* note 1; *Taylor* v. *Rossu*, (1998), 161 D.L.R. (4th) 266 at 313 (Alta. C.A.).

[30] *M* v. *H.*, *supra* note 3 at 616.

fact, the inclusion of same sex couples better achieves all of the objectives of this legislation. Failure to include same sex couples in such legislation may be seen as being an unfair or complete denial of distribution of property or support rights, which in turn could force a member of same sex couple to seek state-funded social assistance.[31] This result cannot be said to be rationally connected to the objectives of the legislation. This consideration alone may preclude any defence that such underinclusive legislation is justifiable under section 1 of the *Charter*.

[30] Finally, it will be difficult for the legislature to argue that there are other interests which need to be balanced which justify limiting the rights of same sex couples, as such financial and property matters are essentially private matters as between the individuals in those relationships. There are no other adequate alternatives available to same sex couples; other legal remedies are of limited availability and are difficult and onerous to establish.

2. Legislation which delegates decision making powers when one party becomes mental or physically incapacitated

[31] There are a number of statutes which seek to ensure that if an individual becomes incapacitated such that the person is no longer capable of making personal decisions, such decisions will be made by someone who has a close relationship with the individual. Presumably a person with whom an individual has a close or intimate personal relationship will better be able to make decisions using values which accord with those which the individual holds. Without such legislation, personal decisions may be made by the state or by a stranger who likely would not hold the same values as the individual. As in most cases an individual's spouse is perceived to have the closest and most intimate relationship with the individual, the existing legislation affords a spouse the greatest extent of rights concerning decisions for an incapacitated individual.

[32] Delegating personal decisions regarding a person's personal, medical and financial matters is an extremely important act. Failing to recognize other forms of close personal relationships, and particularly, denying a person's life partner the right to make decisions for a person and giving that power to another, surely is fundamentally discriminatory.

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[31] *M.* v. *H.*, *supra* note 3 at 636.

[33] A primary consideration here is the perceived ability of same sex couples to be in committed relationships. It has already been judicially determined that same sex couples are equally capable of being in marriage-like relationships.[32] As such, failing to include same sex couples is not rationally connected to the goal of such legislation, which is to give the person of primary importance in an individual's life the ability to make important personal and financial decisions when that person is no longer able to do so.

[34] Finally, the discriminatory effect of this legislation is likely not defensible on the ground of legislative deference. There are no competing interests which the legislature needs to balance; the legislation concerns only personal matters of individuals which do not affect society as a whole.

3. Taxation, pension and government benefits legislation

[35] Legislation concerning taxation, pension and government benefits available to married or common law couples recognizes that such couples are economic units, whose finances are (generally) intertwined. This legislation attempts to provide a fair distribution of taxation obligations based on the economic circumstances of both parties as a couple. Pension and other government benefits legislation, vis-a-vis benefits to spouses, also recognizes the economic unit aspect of couples, as pension benefits of one spouse (which is a contractual right to which the other spouse generally does not have privity) are usually part of the future income plan of the other spouse. As such, it is important to have a scheme for the orderly payment of accrued pension entitlement in the event that the earning spouse dies prior to the pension being paid in full to give effect to these expectations. As with legislation which deals with economic issues arising upon cessation of the relationship, this type of legislation also places a legal obligation on the individuals in a relationship to support each other rather than looking to the state for support.[33]

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[32] See previous discussion above about *M.* v. *H.*, *supra* note 3.

[33] *M.* v. *H.*, *supra* note 3 at 629, relying on the Ontario Law Reform Commission, *Report on Family Law, Part VI: Support Obligations*, *supra* note 29; Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults*, *supra* note 1; *Taylor* v. *Rossu*, *supra* note 29.

[36] Same sex couples are no less economic units than are opposite sex couples. Particularly, there is no valid distinction between same sex couples and opposite sex couples who are cohabiting with regard to taxation, pension, and other government benefits. Their finances may also be inextricably interlinked and they may engage in financial planning together. Excluding same sex couples is not rationally connected to the goal of equitable distribution of tax consequences and other governmental financial benefits as between individuals who function as an economic unit. As such, legislation which excludes same sex couples from taxation and other legislative benefits likely would not survive *Charter* scrutiny.

4. Legislation concerning children, including parental responsibility for naming of and decision making for children, adoption, ability to seek child support

[37] Presently there is no general legislative recognition in Alberta that a child may have two parents of the same sex. However, there are many cases where same sex couples have children, which has led to litigation in Alberta in the context of private adoptions.[14]

[38] Same sex partners are denied legal recognition as parents due to repeated references to a "mother and a father" throughout legislation which deals with rights relating to children. As a result same sex partners cannot seek child support under the *Parentage and Maintenance Act*; both parents' names cannot appear on the child's birth certificate;[15] and same sex couples may not jointly apply to adopt a child into their relationship (although either on their own could do so and then apply for a private intra-couple adoption).[16]

[39] This legislation may be challenged on the ground that it discriminates against same sex couples by denying both the same sex parent and the child the right to be recognized as a family unit and denying the benefits and obligations which accompany the legal recognition of the parent-child relationship. The question then is whether excluding same sex couples from the rights and obligations in this area is rationally connected to the objectives of the legislation.

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[14] *Re A (Adoption)*, *supra* note 14.

[15] *Vital Statistics Act*, *supra* note 19.

[16] *Adult Adoption Act*, *supra* note 19.

As the objective of each piece of legislation differs somewhat, each should be considered separately.

a. Naming of children

[40] The goal of legislation relating to naming a child is to provide timely and accurate recording of information about the child at the time of birth. The primary problem with this legislation is that it provides no mechanism for recognizing two parents of the same sex as parents of the child without formal adoption proceedings. Specifically, when the child is named at birth, it may only bear the name of either the mother, the father, or be hyphenated to reflect both the names of the mother and the father. There is no provision allowing a child to bear the surnames of two same sex partners. When considering this legislation the purpose of the registration and birth certificate must be considered. There is also a question of how, and for what purpose, "parent" is defined. These questions must be answered to determine whether there is a distinction, or discrimination, at all.

b. Seeking child support

[41] The purpose of the *Parentage and Maintenance Act* is to ensure that both parents, although unmarried, assume economic responsibility for their children instead of having the state support the child. As same sex couples cannot marry they cannot seek child support under the *Divorce Act* on the breakdown of a relationship. As such, they are limited to seeking support under provincial legislation. Excluding a parent from the financial responsibility for their children merely because both parents are of the same sex is contrary to the purpose of the Act. This makes it difficult to assert that there is a rational connection between excluding same sex couples from the Act and the purpose of the Act. Without such a rational connection it is likely that the legislative provisions would be found to be discriminatory.

c. Adoption

[42] The purpose of the *Adult Adoption Act* is to provide a scheme governing adoptions that ensures that each adoption is made in the best interest of the child. Adoption applications may be made by individuals, or joint applications for adoption may be made by "spouses". Presumably gay or lesbian individuals may apply to adopt, but no joint application may be made by a same sex couple. As same sex couples may not make a joint adoption application, a child may only be

adopted into a same sex couple on the application of one partner. The couple must then go through a second adoption proceeding to have the child legally adopted by the other partner. Until the second adoption is complete the child has no legal relationship to the second partner and would therefore be denied the legal benefits to which a child is entitled by virtue of the parent-child relationship.[37]

[43] One concern which may be voiced is that it is not in the best interests of a child to be placed with a same sex couple. This proposition was rejected in *Re A (Adoption)*. The Alberta Court of Queen's Bench held that the primary concern in any adoption is that it be in the best interest of the child. The Court stated that the parenting ability of anyone applying to adopt must be assessed on the merits of the particular circumstances. Based on social science evidence presented at trial, the Court held that sexual preference alone is not a relevant consideration in the determination of parenting ability. In fact, the Court found that two separate lesbian couples in that case were "amply qualified" to be parents, and each provided stable, loving environments for the children.[38]

[44] In any event, the existing adoption legislation presently does not *prima facie* exclude same sex couples from adopting children. Rather, it requires same sex couples to undergo a cumbersome adoption process which opposite sex couples do not. Until two separate adoption applications are complete, there is no legally recognized parent-child relationship between the child and both parents which could be to the detriment of the child. The goal of adoption legislation is to ensure that the best interests of the child are met by having a child become part of a suitable family. There is a strong argument to be made that the child's best interests are furthered by being afforded the legal benefits of the parent-child relationship. It is difficult to see how delaying access to these benefits by precluding both same sex parents from making a joint application to adopt in the first instance is rationally connected to the goal of protecting the best interests of the child. This suggests that if challenged under section 15, it likely would not withstand constitutional scrutiny.

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[37] These legal benefits are discussed in *Re A (Adoption)*, *supra* note 14 at 311.

[38] *Supra* note 14 at 319.

5. Legislation which protects privileged marital communications made between spouses

[45] Although only the *Alberta Evidence Act* is in this category, the rights in this area are of sufficient significance that this Act deserves to be discussed specifically.

[46] Spousal privilege protects one spouse from having to reveal information which was imparted to him or her by the other spouse in the course of a marital communication. The purpose of the special privilege is tc further martial harmony by encouraging honesty and openness between spouses as they are in committed, intimate relationships.

[47] The *Evidence Act* excludes same sex couples from the protection of spousal privilege. It may be argued that common law couple are also excluded from this protection, as marriage is a requirement for the invocation of spousal privilege. Without going into a detailed discussion of whether excluding opposite sex common law couples is constitutional, it is significant that same sex couples do not have the option of marrying and may never qualify for this privilege.

[48] This legislation may be challenged on similar grounds to those in issue in *M.* v. *H.*[39] The exclusion of same sex couples from the protection of spousal privilege implies that people in same sex relationships are not capable of being in committed, intimate relationships. As discussed above, the Supreme Court of Canada specifically rejected this proposition, finding that same sex partners are equally capable of having committed, intimate relationships in the same manner as heterosexual couples. The Court held that this implication is discriminatory under section 15(1) of the *Charter*.

[49] It must then be shown that excluding same sex couples from the spousal privilege rules is rationally connected to the goal of encouraging honesty and openness between spouses and furthering marital harmony. While there is no "marital harmony" to preserve in a same sex relationship, the Courts have accepted that same sex couples can be in committed, intimate relationships. Having accepted this proposition, it is likely that a court would find that it is desirable to preserve harmony in same sex relationships as well as marital relationships.

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[39] *Supra* note 3.

Excluding same sex couples from the protection of spousal privilege does not further this harmony. As such, it may be said that the exclusion of same sex couples from the spousal privilege provisions of the *Alberta Evidence Act* is not rationally connected to the purpose of those provisions.

6. Conflict of interest legislation

[50] Many statutes regulate potential conflict of interests which may arise as between spouses. These statutes deal with limiting the use by one spouse of confidential information in the knowledge of the other spouse, and with regulating non-arm's length transactions in certain situations.

[51] The statutes dealing with these situations almost without exception do not include a "same sex partner", or a person of the same sex with whom a party cohabits, from engaging in transactions from which a married spouse is prohibited. This type of legislation is likely discriminatory in that it fails to recognize the legitimacy of same sex relationships. However, it is unlikely that there will ever be a challenge to this type of legislation under section 15(1) of the *Charter* as this type of legislation does not withhold rights from most same sex relationships. Rather, this legislation imposes obligations and restrictions on married and opposite sex common law couples, obligations and restrictions to which same sex couples are not subject.

[52] Excluding same sex couples from this type of legislation is not consistent with the purpose of the legislation. The legislation is intended to limit and regulate *mala fide* transactions which arise from intimate relationships. Using marriage alone as an indicator of an intimate relationship ignores the fact that many people today are in other "marriage-like relationships". Parties to these marriage-like relationships should be subject to the same limitations with regard to conflicts of interest with relation to their partner's affairs in order to meet the goals of the legislation.

D. Conclusions

[53] While each legislative provision which excludes same sex couples must be examined individually to determine if it contravenes the equality guarantee in the *Charter*, it is unlikely that many, if any of these provisions will ultimately be able to withstand *Charter* challenges. With legislation that imposes obligations and

restrictions on couples in close relationships, it is in the public interest to extend the reach of this legislation to include same sex common law couples.

[54] If no comprehensive reforms are made to ensure that all provincial legislation conforms with the equality guarantee in the *Charter*, the Alberta government will likely be forced to incur the legal costs of numerous court challenges in the future. It is likely that the majority of these challenges will be successful, and legislation which discriminates against same sex couples will be declared to be of no force and effect, resulting in the need for reform in any event.

CHAPTER 4. FEDERAL AND PROVINCIAL RESPONSES TO *M.* V. *H.*

[55] Several provinces have responded to the *M.* v. *H.* decision by enacting legislation which attempts to bring some provincial legislation into conformity with the *Charter* with respect to people in same sex relationships. The federal government has also enacted legislation which amends certain federal statutes to include same sex couples. The specific responses will first be reviewed, and then the adequacy of these responses will be addressed.

A. Legislative Reforms

1. Federal reforms

[56] The federal government amended many federal statutes to treat same sex cohabitants in the same way as opposite sex cohabitants.[40] Same sex partners may now claim income tax credits for dependant partners; RRSP transfers may be made to a same sex partner; and surviving same sex partners may claim Canada Pension Plan Benefits.

2. Ontario

[57] Ontario responded to the Supreme Court decision in *M.* v. *H.* with *An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H.*[41] This legislation created a new category of relationship called a "same sex partner" rather than expanding the definition of "spouse" for all purposes. The criteria to qualify individuals as "same sex partners" are the same as those which define opposite sex common law relationships, being two persons who have cohabited continuously for a period of not less than three years, or less than that in a relationship of some permanence and they are the natural or adoptive parents of a child. The amended legislation now affords same sex partners benefits such as entitlement to spousal support; dependants' relief; death benefits under no-fault insurance regimes; and survivor's benefits under workers' compensation and victim compensation regimes.

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[40] *Modernization of Benefits an Obligations Act*, S.C. 2000, c. 12.

[41] S.O 1999, c. 6.

3. British Columbia

[58] British Columbia had been amending its legislation in a relatively piecemeal factor until recently. In 1995 British Columbia permitted same sex couples to jointly adopt a child, or for one partner to adopt the child of the other.[42] In 1996 legislation was amended to permit same sex partners to make medical decisions on behalf of the other.[43] Also in 1996 legislation was amended to permit same sex partners to participate in each other's pension plans.[44] In 1997, British Columbia amended its *Family Relations Act* to include same sex cohabitants for the purposes of child custody, spousal support, and child support provisions. Although same sex couples are not *prima facie* included in the provisions regarding distribution of matrimonial property, the Act provides that they may contract into these provisions.

[59] British Columbia recently introduced the *Definition of Spouse Amendment Act, 2000*[45] which amends the definition of "spouse" in virtually all other statutes to which amendments had not been made previously. This Act defines "spouse" as:

> " a person who
>
> (a) is married to another person and is not living separate and apart within the meaning of the *Divorce Act* (Canada), from the other person, or
>
> (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender."

4. Manitoba

[60] Manitoba has passed legislation[46] which extends rights to same sex couples in a limited number of areas. The approach taken in the amending legislation is to redefine "common-law partner" as:

> a person who, not being married, cohabited with [the other] in a conjugal relationship
>
> (a) for a period of at least three years, or

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[42] *Adoption Act*, R.S.B.C. 1996, c. 5.

[43] *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181.

[44] *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352.

[45] S.B.C. 2000, c. 24.

[46] *Act to Comply with the Supreme Court Decision in M. v. H.*, S.M. 2001, c. 37.

> (b) for a period of at least one year and they are together the parents of a child.

Once same sex partners meet the above requirements they are entitled to rights with respect to superannuation; dependant's relief; family maintenance; survivor's benefits; pension benefits; and worker's compensation benefits. The Manitoba Attorney General has also announced that Manitoba will introduce legislation in the spring of 2002 to extend adoption rights to same sex couples.[47]

5. New Brunswick

[61] New Brunswick has extended rights to same sex couples in the areas of spousal support, family relief, and fatal accidents.[48] However, New Brunswick has adopted a restrictive qualifying definition which same sex couples must meet in order to receive entitlement to these benefits. A couple must live together for at least three years in a family relationship in which one person has been substantially dependent upon the other for support.[49]

6. Newfoundland

[62] Newfoundland has made reforms limited to the issue in *M.* v. *H.* It has imposed support obligations on common law partners which includes same sex partners,[50] but no rights have been extended to same sex partners in other areas. To qualify for support obligations, partners must cohabit for at least two years, or together be the biological or adoptive parents of a child.

7. Saskatchewan

[63] Saskatchewan has recently enacted comprehensive legislation which extends the definition of "spouse" to include "a person with whom that person is cohabiting as a spouse", and generally requires that the cohabitation be for either

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[47] M. Rabson, "Same-Sex Couples to Gain Adoption Rights: Manitoba" *Winnipeg Free Press* (December 2001) 11, online: <www.winnipegfreepr...bscriber/local/story/29835p-8890c.html>.

[48] *Child and Family Services and Family Relations Act, 1980*, S.N.B. 1980, c. C-2.1, (title change to *Family Services Act*, S.N.B 1983, c. 16, s. 1), as am. by *An Act to Amend the Family Services Act*, S.N.B. 2000, c. 59, s. 1.

[49] *Ibid.*, s. 112(3).

[50] *Family Law Act*, R.S.N. 1990, c. F-2, ss. 35-36; as am. by *An Act to Amend the Family Law Act*, S.N. 2000, c. 29, s. 1.

two years as a spouse, or in a relationship of some permanence if there is a child.[51] The amendments replace virtually all references to the terms "marriage" with the new definition of "spouse" and the term "matrimonial" with the term "family" (i.e. "matrimonial property rights" is now referred to as "family property rights").

[64] The amendments confer most of the rights and obligations of married couples on people satisfying the cohabitation requirements, with no distinction between opposite and same sex couples. In addition to including same sex couples in spousal support and matrimonial property division legislation, they are also given rights with respect to adoption; changing names; dependents' relief; intestate succession; freedom of information and privacy; pension benefits; and survivor benefits.

8. Quebec

[65] Quebec passed omnibus legislation in 1998 to treat same sex cohabitants equally with unmarried opposite sex cohabitants.[52] However, the Quebec National Assembly is considering legislation that creates a new form of status for same sex couples, called a "civil union".[53] This legislation provides formal recognition of same sex partners in a civil union and confers upon partners in a civil union virtually all of the same rights and obligations as married couples.[54] The civil union would be open to any same sex partners over the age of 18 who are not married or in another civil union.[55] The solemnization of a civil union is subject to the same rules that apply to solemnization of marriage. The solemnization of the civil union may take place before any officiant who is qualified to perform marriage ceremonies, although no minister of religion may be compelled to solemnize a civil union if to do so would be contrary to the belief of that religion.[56]

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[51] *The Miscellaneous Statutes (Domestic Relations) Amendment Act*, 2001, S.S. 2001, c. 50 and *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*, S.S. 2001, c. 51.

[52] *An Act to Amend Various Legislative Provisions Concerning De Facto Spouses*, S.Q. 1999, c. 14.

[53] Draft Bill, *An Act Instituting Same-Sex Civil Unions and Amending the Civil Code and Other Legislative Provisions*, 2d Sess., 36th Leg., Quebec, 2001.

[54] *Ibid.* preamble to draft legislation.

[55] *Ibid.*, s. 21 (proposing changes to c. I, s. 521.1 of the *Civil Code of Quebec (1991)*, c. 64).

[56] *Ibid.*, s. 21 (proposing changes to c. I, s. 521.2 of the *Civil Code of Quebec (1991)*, c. 64).

A civil union may be dissolved by the death of one party, by a court judgment or by a notarized joint declaration of the parties.[57]

9. Nova Scotia

[66] Nova Scotia recently responded by implementing a "domestic partnership registry" ("DPR") which creates a form of "equivalent to marriage" status. Same sex couples, and in fact any two adults, may register their relationship. Upon doing so they will be entitled to a bundle of rights which are similar, although not identical to, those afforded to married couples.[58] The substance and form of Nova Scotia's domestic partnership registry is discussed in detail below.

10. Prince Edward Island

[67] To date, Prince Edward Island has not made any legislative changes to confer rights on same sex cohabitants.

B. Do the Legislative Responses Satisfy the *Charter* Issues?

[68] Although several provinces and the federal government have made some reforms which purport to respond to the Supreme Court decision in *M.* v. *H.*, it is questionable whether the various responses satisfy the *Charter* requirements with respect to the rights of individuals in same sex relationships.

1. Failure to eliminate discrimination in all areas

[69] The obvious flaw in most of the reforms which the federal government and the provinces have pursued is the failure to address all legislation which discriminates against same sex couples. While some provinces have extended more rights than others, it cannot be said that all of the areas of discrimination have been eliminated. For instance, none of the provinces, nor the federal government, has extended the spousal immunity protections in their respective evidence acts to include same sex couples. The federal government has also not extended to same sex couples certain rights relating to immigration which are available to married couples.

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[57] *Ibid.*, s. 21(proposing changes to c. III, s. 521.10 of the *Civil Code of Quebec (1991)*, c. 64).

[58] *Law Reform (2000) Act*, S.N.S. 2000, c. 29, s. 54(3).

[70] While the reforms to date begin to address the discriminatory treatment of same sex couples, the fact remains that any legislation which excludes same sex couples from other rights which are availed to common law couples is most likely discriminatory and in violation of the *Charter*. It is clear that marriage, or opposite sex common law status, may only be used as a basis to exclude same sex couples from protections and benefits conferred by law if the legislature can demonstrate that such status is truly relevant to the goal and values underlying the legislative provision in question.[59] It is difficult to conceive of a situation where the criterion of being an "opposite sex" couple is a valid distinction which is truly relevant to the goals underlying the legislation.

2. Failure to equate rights of same sex couples and married couples

[71] With the exception of Nova Scotia, the reforms which the provinces have made in response to *M.* v. *H.* have to varying degrees equated same sex couples with common law couples. However, even if "same sex partners" are included in all of the same rights as common law couples (as in the Saskatchewan reforms), this approach may still discriminate against same sex couples. The argument will be that equating individuals in same sex relationships with those in opposite sex "common law" relationships does not afford same sex partners the same caliber of rights to which married couples are entitled. The distinction is that opposite sex couples acquire all rights of marriage immediately upon marriage without having to wait for the expiration of a prescribed period of time. Thus, it may be argued that opposite sex couples can choose to acquire rights of marriage at any time. Treating same sex couples as common law couples in order to qualify for certain rights denies same sex couples the ability to acquire legislated rights associated with marriage at a time of their choosing. They are forced to fulfil cohabitation requirements before they are entitled to the same rights as married couples.

[72] The benefits and obligations of marriage apply because people are in committed, intimate relationships. As marriage is usually the ultimate indication of a committed relationship, it is reasonable to have benefits and obligations vest immediately. Since committed, intimate relationships are the key requirement for the vesting of these benefits, it is reasonable to require opposite sex individuals to

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[59] This is the language used by McLachlin J. (as she then was) in *Miron* v. *Trudel*, *supra* note 2 at 752.

cohabit for a period of time to demonstrate that they are in such a relationship if they choose not to marry. However, same sex couples in committed relationships who may wish to acquire the rights associated with marriage cannot do so prior to the expiration of the cohabitation period. This may be seen as discrimination.

[73] A *Charter* challenge could arise in circumstances where an individual in a same sex relationship is denied certain legislated benefits associated with "marriage-like" relationships (i.e. survivor benefits) where the parties have lived together for slightly less than the period required to qualify for the "same sex relationship" status in the relevant legislation. Since the parties are not permitted to marry, they cannot obtain these rights without fulfilling the cohabitation requirement.

[74] A challenge on the basis of unequal rights as between married couples and same sex couples has the potential for success when one considers the combined effect of the Supreme Court of Canada decisions in *M.* v. *H.* and *Miron* v. *Trudel*.[60]

[75] In *Miron* v. *Trudel* the Supreme Court held that common law couples were entitled to the same benefits as married couples for the purposes of certain insurance benefits. In doing so, the Court clearly indicated that non-traditional committed relationships must be recognized at law:

> "The issue is not whether marriage is good but rather whether it may be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement due to circumstance. ...it is not anti-marriage to accord equal benefit of the law to non-traditional couples."[61]

This comment is particularly relevant to the situation of same sex couples. As previously discussed, same sex couples are capable of entering into committed, dependent relationships in the same manner as are opposite sex couples. However, couples in same sex relationships are denied equal treatment because they cannot access rights associated with marriage at a time of their choosing. This differential treatment results solely from the circumstances experienced by same sex couples, as they do not have the option to marry. The result is that there could very well be a successful *Charter* challenge to legislation which limits same sex couples to the circumstances of opposite sex common law couples.

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[60] *Supra* note 2.

[61] *Supra* note 2 at 751.

[76] This is a difficult situation to address. It clearly is not desirable to impose both benefits and obligations on same sex couples immediately upon commencement of cohabitation, as those benefits and obligations are intended to apply to those in committed, interdependent relationships of some permanence. In fact, many people, regardless of sexual orientation, would oppose having rights and obligations of marriage ascribed immediately upon cohabitation. However, while a mandatory period of cohabitation for opposite sex common law couples is a reasonable requirement for ascribing rights and obligations of marriage, this requirement is less reasonable for same sex couples who do not have the option to marry.

[77] The proposed legislation in Quebec would eliminate any discrimination between same sex couples and married couples by instituting a "civil union" as an alternative to marriage. Nova Scotia has attempted to minimize any discrimination by implementing a Domestic Partnership Registry ("DPR"). The DPR gives same sex couples the option to recognize their relationship for certain legal purposes a time of their choosing. The DPR will be discussed in detail below.

CHAPTER 5. ALTERNATIVES TO CONFORM WITH THE *CHARTER*

[78] As can be seen by the approaches which other provinces have taken, there are several alternatives available to deal with the issue of rights available to same sex couples:

1) Continue to amend provincial legislation on a piecemeal basis in response to individual court challenges;

2) Redefine marriage at the federal level and allow same sex couples to marry;

3) Create a new category of "same sex relationship" which defines a same sex relationship and ascribes certain rights to this relationship;

4) Redefine "spouse" for the purpose of some or all provincial legislation;

5) Amend the definition of "common law relationship" to include same sex couples, thereby equating same sex couples with common law couples;

6) Permit same sex couples to contract into rights afforded to married couples;

7) Create a domestic partnership registry which allows any two people, regardless of sexual orientation, to register their relationship and acquire legal rights associated with marriage.

A. Continue to Amend Provincial Legislation on a Piecemeal Basis in Response to Individual Court Challenges

[79] The minimal response would be to continue as the province has and amend statutes as they are challenged and declared invalid. As recognized by the Court in *M.* v. *H.*,[62] this is not a desirable approach. Court challenges are expensive for both the individual claimant and the government. Amending legislation in a piecemeal fashion is also inefficient and can result in legislation which is internally inconsistent.

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[62] *Supra* note 3 at 645.

B. Redefine Marriage at the Federal Level and Allow Same Sex Couples to Marry

[80] One option is to redefine "marriage" to include members of the same sex. However, pursuant to section 91 of the *Constitution Act, 1982*[63] marriage is within the jurisdiction of Parliament.[64] As such, the provinces cannot redefine marriage through provincial legislation. While the province does not have the jurisdiction to permit same sex couples to marry, there are certain aspects of marriage within provincial jurisdiction. Solemnization of marriage, property and civil rights are within provincial jurisdiction, and these heads of power overlap into the marriage regime. As such, although the province cannot actually permit the marriage of same sex individuals, it can grant spousal status for legal purposes which fall under the province's jurisdiction.

[81] It is not appropriate for the province to refrain from taking legislative action on the basis that same sex couples may, at some time in the future, be permitted to marry. While permitting same sex couples to marry would eliminate the *Charter* problems with the current provincial legislation, it is not a solution which is available to the province, and it is not known when, or if, this matter will be settled by the Supreme Court of Canada or whether the federal government will propose reform on its own. Regardless, the ability of same sex couples to marry is irrelevant to the current state of the law in Alberta, where many provincial statutes likely violate the *Charter* rights of same sex couples and thus may be unconstitutional. The constitutional problems which are found in Alberta legislation should be dealt with expeditiously to eradicate the discrimination which same sex couples currently encounter.

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[63] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[64] Marriage is defined as "the union of one man and one woman to the exclusion of all others ...." (*Hyde* v. *Hyde and Woodmansee* (1866), 1 L.R. P. & D. 130. As such, it excludes same sex individuals. This definition is currently the subject of a *Charter* challenge in British Columbia in *EGALE Canada Inc.* v. *Canada (Attorney General)* 2001 BCSC 1365. The British Columbia Supreme Court held that neither the court nor Parliament has the ability to amend the definition of marriage. In the alternative, the Court found that the current definition of marriage breaches s. 15(1) of the *Charter*, but it is a reasonable limit under s. 1. It is likely that this matter will be appealed and will eventually heard by the Supreme Court of Canada. Another challenge to the definition of marriage has been launched in Ontario (see J. Gadd, "Same-sex Marriage Challenge Begins" *The Globe and Mail* (6 November 2001) A10. No decision has been rendered in that action as of the date of this publication.

C. Create a New Category of "Same Sex Relationship" which Defines a Same Sex Relationship and Ascribes Certain Rights to this Relationship

[82] As was the approach in Ontario, a new category of "same sex relationship" could be created which is separate and apart from both the definition of "spouse" and "common law". This response allows for ease of distinction in the event that same sex couples are not given the full set of legislated rights associated with marriage.

[83] Other than the potential *Charter* problems to which this option gives rise (discussed below) consideration must also be given to two matters: (i) how "same sex relationship" would be defined, and (ii) what rights would be extended to same sex relationships.

[84] Factors constituting a "same sex" relationship could include:

i) the length of cohabitation;

ii) whether the parties need be in a conjugal relationship;

iii) whether having a child affects the requisite length of cohabitation;

iv) whether there needs to be an element of dependency in the relationship.

While this option would assist in bringing some legislation into conformity with the *Charter*, is still of questionable constitutional validity for the reasons outlined in the prior discussion of the adequacy of the other provincial responses. In particular, this response is inadequate if same sex partners are still excluded from certain benefits which are available to others in marriage-like relationships.

D. Amend the Definition of "Common Law Relationship" to Include Same Sex Couples, thereby Equating Same Sex Couples with Common Law Couples

[85] Another alternative is to amend the existing definition of "common law relationship" to include same sex couples. This is the approach taken in the Manitoba legislation.

[86] The deficiencies with this response, being underinclusiveness and differential treatment with married couples, have been discussed above.

E. Redefine "Spouse" for the Purpose of Some or All Provincial Legislation

[87] "Spouse" may be redefined in all provincial legislation to include any two people who meet certain criteria (presumably cohabitation), and would include both same sex and opposite sex couples. This is the approach taken in the recent Saskatchewan legislative amendments. By doing so there would be no distinction between the rights afforded to common law couples and same sex couples, presuming that the amended definition applies to all legislation.

[88] This response would comply with the Supreme Court mandate in *M.* v. *H.*, as that decision technically affected only legislation which differentiates between common law couples and same sex couples. However, while this approach resolves the issue of underinclusiveness, it does not address the problems associated with differential treatment of same sex couples and married couples.

F. Permit Same Sex Couples to Contract into Certain Rights

[89] Another alternative is to grant same sex couples certain rights on the same grounds as opposite sex couples, but allow them to contract into other rights which would not *prima facie* be availed to them. The British Columbia *Family Relations Act* has taken this approach with respect to matrimonial property. Same sex couples may, through a written agreement, be bound by the matrimonial property provisions of the Act. Absent such agreement, however, the Act would not apply in the event of a breakdown of the relationship.

[90] While this response may address certain problems relating to the disparate treatment of married versus same sex couples, it would likely have to be limited to private matters between the individuals in the relationship. Contracting as between the individuals would not address issues involving third parties, such as taxation rules and legislated benefits. As such, it does not address the problem of underinclusiveness of the response.

G. Create a Domestic Partnership Registry which Allows any Two People, Regardless of Sexual Orientation, to Register their Relationship and Acquire the Benefits and Obligations of Marriage

1. DPRs generally

[91] DPRs give parties to whom marriage was not available, or who do not wish to be formally married, a mechanism by which people voluntarily acquire an "equivalent to marriage" status wherein they have rights and obligations comparable to those of married spouses. The DPR negates the need for two adults to wait for the expiration of a period of cohabitation prior to obtaining rights and obligations which are conferred on people in a committed, interdependent relationship. DPRs exist in various forms in Europe, the United States, and now Nova Scotia.

[92] In jurisdictions with DPRs, there are three forms of recognized spousal status:

i) married;

ii) "common law" which arises through cohabitation; and

iii) registered domestic partners.

[93] While each type of status indicates that the parties are in a committed, interdependent relationship, jurisdictions which recognize all three groups have, to greater or lesser extents, chosen to afford different rights to each group. The different approaches to the rights given to individuals in domestic partnerships is particularly salient, as it varies from almost an "equivalent to married" status to a status which differs only minimally from common law.

[94] In the United States, rights acquired through a DPR are generally quite limited, entitling same sex partners only to certain employment benefits (although some states offer more inclusive rights). Partnership laws in Europe are more substantive. Several countries in Europe have passed partnership registry laws,[65] including Denmark (1989); Norway (1993); Sweden (1994); Iceland (1996); and

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[65] For a discussion of the cohabitation laws which give same sex partners varying bundles of rights, see Caroline Forder, "European Models of Domestic Partnership Laws: The Field of Choice" (2000) 17 Can. J. Fam. L. 371.

the Netherlands (1997).[66] European partnership legislation generally gives registered partnerships the same rights, benefits and obligations as married couples with few exceptions. Generally, the primary exceptions are that same sex couples may not marry, and there are some limits on the ability to adopt children.

2. The Nova Scotia Law Reform Commission/British Columbia Law Institute model

[95] As mentioned above, Nova Scotia has instituted a DPR which came into force on June 1, 2001. The legislation which establishes the registry appears to be based on a 1998 British Columbia Law Institute report entitled *Report on Recognition of Spousal and Family Status*.[67]

[96] Nova Scotia recognizes three forms of marital status:

i) married;

ii) common law relationships where rights arise after a period of cohabitation; and

iii) registered partnerships.

[97] The DPR in Nova Scotia is not limited to same sex partners; any two adult parties may register a domestic partnership. It is intended to recognize and give certain rights to people in committed, intimate relationships. Penalties may be imposed if individuals attempt to use the DPR to commit fraud to obtain certain benefits to which they would not otherwise be entitled.

[98] Registration is done through the Office of Vital Statistics. However, the parties have the option of executing a partnership agreement without registering it. If the partnership agreement is executed but not actually registered, the agreement is valid as between the partners but has limited significance against third parties. An unregistered partnership agreement has some benefit, in that it constitutes

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[66] *Ibid.* at 390.

[67] British Columbia Law Institute, *Report on Recognition of Spousal and Family Status* (Report No. 5) (Vancouver: British Columbia Law Institute, 1998). This report was instigated by the British Columbia Attorney General wherein the Attorney General asked the BCLI to review all provincial legislation and recommend changes which would provide legal recognition to a variety of family relationships within the province. The Attorney General imposed a rigorous time line on the project, asking the BCLI to commence work in March of 1998. The project was completed in November 1998. As such, the report notes that there was no opportunity for proper consultation with stakeholders or the community in general.

evidence of a partnership. This may be relevant in cases of an intestacy where a surviving partner applies for a share of the estate.[68] If a partnership is not registered, the parties would be treated as "common law" partners for any purposes involving third parties (such as government benefits).

[99] Upon registering at the Nova Scotia DPR, the domestic partnership is subject to and gives rise to the same operations of law respecting the status of "spouse" under the following Nova Scotia legislation:

i) *Fatal Injuries Act*;
ii) *Health Act*;
iii) *Hospitals Act*;
iv) *Insurance Act*;
v) *Intestate Succession Act*;
vi) *Maintenance and Custody Act*;
vii) *Matrimonial Property Act*;
viii) *Members' Retiring Allowances Act*;
ix) *Pension Benefits Act*;
x) *Probate Act*;
xi) *Testators' Family Maintenance Act*;
xii) *Public Service Superannuation Act*;
xiii) *Teachers' Pension Act*;
xiv) *Wills Act*; and
xv) *Workers' Compensation Act*.

[100] While this is a fairly inclusive bundle of rights, domestic partnership registration does not fully grant an equivalent to marriage status, for example, spousal privilege under the evidence act is still excluded. It should be noted that the rights in acts (xii) to (xv) above were not included in the original legislation; these rights were extended to registered partnerships in July, 2001.[69]

3. Benefits of DPRs

[101] The Courts have consistently held that it is necessary to give legal recognition to, and not to discriminate against, parties who are in committed

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[68] *Law Reform (2000) Act*, *supra* note 58.

[69] *Justice Administration Amendment (2001) Act*, S.N.S. 2001, c. 5, s. 47(2).

relationships other than traditional marriages. A DPR is an option which gives effect to many fundamental principles: voluntariness, in that people may choose to assume the benefits and obligations of marriage; fairness between parties in a committed relationship involving issues which arise at the termination of the relationship, where one party is in a more vulnerable position and is in need of protection; minimizing discrimination in access to social status; equity in distribution of benefits; equality among family relationships; and protection of privacy.[70]

4. Problems with provincial DPRs

[102] The DPR is not a perfect solution for recognizing same sex relationships. There has been criticism that the "equivalent to marriage" approach gives same sex relationships a second-class standing in society which is inferior to marriage. However, since the province does not have jurisdiction to permit same sex couples to marry, a form of DPR is the most effective way for the province to extend equal treatment under the law to same sex couples.

[103] The primary issue associated with DPRs is consideration of which benefits and obligations of marriage attach upon registration of a domestic partnership. If the intent is to create an "equivalent to married status", the rights and obligations which are conferred to a registered domestic partnership should mirror those attached to marriage as closely as possible. Failing to do so opens up the DPR legislation to *Charter* challenges previously discussed.

[104] Extra-jurisdictional recognition of registered domestic partnerships within other provinces in Canada and in foreign countries would be a problem. Parties may lose rights which they have acquired through the domestic partnership registration if they leave the province in which they have registered. This issue may be resolved throughout Canada through reciprocal recognition provisions in the domestic partnership legislation. However, it is more difficult to ensure that a provincially registered domestic partnership is recognized outside of Canadian borders.

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[70] BCLI Report, *supra* note 67.

[105] The issue of extra-provincial recognition of registered domestic partnership status also raises the question of appropriate residency requirements for registration. This could be addressed through uniform residency requirements across Canada, assuming DPRs are enacted in other jurisdiction.

CHAPTER 6. ALBERTA'S APPROPRIATE RESPONSE

[106] When assessing how the Alberta government should deal with the issue of the rights of same sex couples, the question which must be considered is what is the objective of amending the legislation based on the challenges?

[107] If the objective is to eliminate discrimination and provide same sex couples with equal treatment under the law, a form of DPR, as well as recognition of common law same sex relationships is likely the best way to achieve this goal.

[108] If the objective is restricted to recognizing and protecting economic rights in interdependent, committed relationships, then it may be sufficient to create a new category of spousal status in specific statutes.

[109] Finally, if the objective of legislative amendment is to achieve minimal compliance with the Supreme Court decision in *M.* v. *H.*, the province may make minimal amendments to the *Domestic Relations Act* to extend spousal support rights to same sex couples. However, this would leave legislation in other areas open to attack.

[110] While the latter two objectives respond specifically to *M.* v. *H.*, they fail to take into account that at present much of the legislation in Alberta is unlawful as it fails to comply with the *Charter*. A response which addresses these limited objectives will likely result in expensive court challenges and necessitate the need for further reforms in the future.

[111] These latter two objectives also fail to address legislation which is unlikely to be challenged where treating a same sex partner as "spouse" would result in imposing an obligation or a burden rather than a benefit.[71] As these statutes are intended to protect the public from non-arm's length transactions and unlawful use of confidential information, failing to give legal recognition to same sex couples in these areas undermines the purpose of this legislation. As such, not only is the failure to recognize same sex relationships not in the interest of the individuals in

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[71] See discussion above.

those relationships, it cannot be in the best interest of the public at large with respect to these public protection statutes.